IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.383 OF 2007
IN
INSOLVENCY PETITION NO.95 OF 2005

Sundaram Finance Limited .... Appellants
Vs.
Ashok D. Soniminde .... Respondent

Sarvasri Kishore Jain with Gaurang Mehta
for the Appellants.

None present for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: JUNE 06, 2007

P.C:

1. Heard. This appeal arises from the order dated 21-4-2007 whereby the insolvency petition has been held to be not maintainable relying upon the decision of the Apex Court in the matter of **Paramjeet Singh Patheja v. ICDS Ltd.,** reported in JT 2006 (10) SC 41.

2. Based on the award dated 20-2-2002 passed by the sole arbitrator in Arbitration Case No.M/SF/6/2001 against the respondent herein, an insolvency notice No.N/288 of 2004 came to be issued on 30-10-2004 against the respondent. The notice was served upon the respondent on 22-3-2005. The respondent did not take any steps to comply with the requisitions of the

insolvency notice and the insolvency petition came to be filed on 9-6-2005.

3. Amongst the various contentions sought to be raised, the learned Advocate appearing for the appellants has strenuously argued that in the present case, in any event, the respondent did not prefer any application for setting aside the insolvency notice served upon him and, therefore, it had become final and it amounted to the respondent having committed the act of insolvency and, therefore, the petition was required to be made absolute and the order of adjudication had to be passed against the respondent. According to the learned Advocate, therefore, the impugned order is liable to be set aside and the matter to be remanded for appropriate decision.

4. The learned Advocate further submitted that though various clauses of sub-section (1) of Section 9 of the Presidency Towns Insolvency Act, 1909 and in particular Clauses (e) and (h) specifically refer to decree of a Court, the sub-section (2) of Section 9 does not make any such reference to any Court while referring to the liability of the debtor under a decree or an order for payment of money. Being so, according to the learned Advocate, once notice is issued, taking into consideration the provisions of sub-section (5) of Section 9, it was incumbent upon the respondent to take

out notice of motion for appropriate relief and failure in that regard would ipso facto result in the insolvency notice becoming final and then consequences shall follow. Having ignored this aspect while dismissing the petition, according to the learned Advocate, the impugned order is liable to be set aside.

5. The Apex Court in **Paramjeet Singh Patheja's** case (supra) while rejecting the contention that there is no distinction between the award under the Arbitration and Conciliation Act, 1996 and the decree passed by the Civil Court, held that the Presidency Towns Insolvency Act, 1909 does not define the word "decree" or "order" and the meaning of these terms has been well-settled since the C.P.C. of 1859 and 1882 and has been again defined in the C.P.C. of 1908 and the award of the arbitrator is not intended to be a decree or an order. Having held so, the Apex Court has further ruled that:

> "that no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award."

The law on the point as to whether the award by an arbitrator under the Arbitration and Conciliation Act, 1996 can be said to be a decree or an order for the

purpose of the Presidency Towns Insolvency Act, 1909 is thus well-settled by the said decision of the Apex Court.

6. It is also pertinent to note that Section 9(2) of the Presidency Towns Insolvency Act, 1909 specifically refers to a decree or an order for payment of money and undisputedly, in the case in hand, the insolvency notice was not issued on the basis of either a decree or an order for payment of money but admittedly, on the basis of an award passed under the Arbitration and Conciliation Act, 1996. The case in hand, therefore, is squarely covered by the decision in Paramjeet Singh Patheja's case, as rightly held by the learned single Judge.

7. The contention that on account of failure on the part of the debtor to take out necessary proceedings under Section 9(5) of the Presidency Towns Insolvency Act, 1909, the insolvency notice has become final and it amounts to an act of insolvency on the part of the respondent and therefore further consequences as provided under the said Act have to follow, is devoid of substance. Once it is clear that the jurisdiction or authority to issue notice under Section 9(2) can arise only in cases of a decree or order for payment of money and the expression "decree" or "order" under the said

Act does not include an award under the Arbitration and Conciliation Act, 1996, any such notice issued in the absence of a decree or an order of the Court, the same would be without jurisdiction. The very act of issuance of notice being without jurisdiction, same would be bad ab initio and obviously the consequences which would otherwise flow from a lawful act cannot flow from an unlawful act and considering the same, the notice without jurisdiction would not create any obligation for the respondent to take out proceedings under Section 9(5) of the said Act and any failure on the part of the respondent to take out any such proceedings under Section 9(5) of the said Act consequent to the notice issued without jurisdiction, would not lead to the conclusion that the respondent has committed an act of insolvency. Considering the same, therefore, no fault can be found with the order rejecting the insolvency petition.

8. Though various other contentions were sought to be raised, it is not necessary to deal with the same as basically the notice which was issued was without jurisdiction and, therefore, any subsequent proceedings at the instance of the respondent were totally uncalled for.

9. In the result, therefore, there is no case made out

for interference in the impugned order and the appeal is liable to be dismissed and is accordingly dismissed with no order as to costs.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

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